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## Some Remarks on Reservations to Declarations of Acceptance

**Abstract.** The essay concerns the reservations attached to the declarations accepting the compulsory jurisdiction of the two International Courts.

As early as during the 1920s when States consented to the compulsory jurisdiction of the first World Court they attached limitations on, conditions or reservations to their declarations of acceptance. For these declarations, there were no rules whatever prescribing any sort of uniformity or similarity of content in any aspects, and States formulated more and more complicated restrictions to their declarations of acceptance.

After the International Court of Justice had been established, States continued the practice of attaching reservations to declarations of acceptance and, moreover, increased the number thereof, “inventing” more and more complicated reservations. Quite a few of such reservations placed much more limitations on the Court’s compulsory jurisdiction than the interwar declarations of acceptance had done and a no small part of them left loopholes of escape from the jurisdiction recognized.

In analysing the problems of permissible reservations, the author refers to the rules and criterias developed in international treaty law on the reservations to multilateral treaties and to the jurisprudence of the two World Courts. She concludes that the declarations of acceptance are unilateral acts and the States are free to attach any reservation to their declarations of acceptance.

**Keywords:** International Court of Justice, optional clause, declarations of acceptance, reservations to declarations of acceptance

In the law of treaties it is generally accepted that when signing, ratifying, approving or acceding to multilateral treaties States, in a formal declaration, may limit the effects of a treaty on themselves in relation to the other contracting parties as a condition for becoming a party to the particular treaty.<sup>1</sup> On the analogy of this there has emerged a State practice to include limitations, conditions in their declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice and the International Court of Justice.

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<sup>1</sup> Cf. Lord McNair: *The Law of Treaties*. Oxford, 1961. 158.

Already the very first declarations of acceptance made after the entry into force of the Statute of the Permanent Court of International Justice, contained some stipulations by which States limited their consent given to the compulsory jurisdiction of the Court.

Both the literature of international law and the practice of the two Courts refer to such limitations, conditions, exclusions, exceptions or restrictions etc. as “reservations”, a term not the most fortunate chiefly because the said clauses are not deemed to be real reservations and, as will be discussed later, differ in many aspects from reservations to multilateral treaties.<sup>2</sup> The appearance of such clauses was somewhat “unexpected”, for at the time of drafting the Statute of the Permanent Court of International Justice the Committee of Jurists did not anticipate any reservation being made concerning the compulsory jurisdiction accepted.<sup>3</sup> On the other hand, the acceptance of compulsory jurisdiction with reservations was not really so “unexpected”, since in interstate practice it is by no means a novelty that States made subject their consent to arbitration treaties to stipulations removing one or more specific issues from settlement by arbitration. Thus arbitration treaties frequently included stipulations to the effect that arbitration did not operate to issues affecting the “vital interests”, the “national honour”, the “independence” and such like of the given State. At the time this was taken for granted so much as to lead some authors to assert that “even when not definitely expressed, the stipulation concerning vital interests is yet included in all arbitration treaties.”<sup>4</sup>

## 1. The Interwar Practice

In connection with declarations under the optional clause Article 36, of the Statute of the Permanent Court of International Justice provides the following:

<sup>2</sup> Cf. Maus, B.: *Les réserves dans les déclarations d'acceptation obligatoire de la Cour internationale de Justice*. Genève, 1959. 94.

<sup>3</sup> Cf. Oda, S.: Reservations in the Declarations of Acceptance of the Optional Clause and the Period of Validity of those Declarations: the Effect of the Schultz Letter. *The British Yearbook of International Law* 1989. 4.

<sup>4</sup> Cf. Wehberg, H.: Restrictive Clauses in International Arbitration Treaties. *American Journal of International Law*. 1913. 310.

“The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several Members or States or for a certain time”

In other words, certain limitations, namely reciprocity and certain limitations as to time, are permitted by the Statute itself. Hersch Lauterpacht explains this as follows:

“It is true that the Optional Clause does not provide *expressis verbis* for the possibility of reservations being made, but there is no necessity for any such express provision. As a general rule a State may qualify any treaty obligation by such reservations as it deems necessary; treaties of arbitration, as their history shows, certainly do not constitute an exception in this respect.”<sup>5</sup>

In the early 1930s Alexander Pandelli Fachiri, writes that “... in the present state of international law the language of Article 36, with its reference to certain reservations, does not preclude the admissibility of further reservations one way or the other.”<sup>6</sup>

The literature of international law of the interwar period nevertheless contains views that—since Article 36, of the Statute refers only to “reciprocity” and “a certain time”—*a contrario* one can come to the conclusion that no other reservations may be attached to declarations accepting the Court's compulsory jurisdiction.<sup>7</sup> That position found few followers, and, so far as we know, Judge Levi Carneiro was the only member of the two International Courts to identify himself with it.<sup>8</sup> As against this, the dominant view was that Article 36, had no restrictive character in this respect and that States were free to attach other limitations on or reservations to their declarations of acceptance.<sup>9</sup> An other

<sup>5</sup> Lauterpacht, H.: The British reservation to the Optional Clause. *Economica*. 1930. 168.

<sup>6</sup> Cf. Fachiri, A. P.: *The Permanent Court of International Justice*. London, [1932] 1980. 98.

<sup>7</sup> Cf. Higgins, P. A.: *British acceptance of compulsory arbitration under the Optional Clause and its implications*. Cambridge, 1929. and Brierly: *The Times* (1929) [1 October]. Quot. Maus: *op. cit.* 85.

<sup>8</sup> See the Dissenting Opinion of Judge Levi Carneiro in the Anglo-Iranian Oil Co. Case. *Anglo-Iranian Oil Co. Case*. Preliminary Objections. Judgement 2 July 1952. *ICJ Reports*, 1952. 154.

<sup>9</sup> Cf. Fachiri: *op. cit.* 98., and Lauterpacht: *op. cit.* 137., as well as Hudson, M. O.: *The Permanent Court of International Justice, 1920–1942*. New York, 1972. 399.

author points out referring to the first Hague Peace Conference that “in the effort to reconcile the idea of obligatory arbitration with the possession of inalienable sovereign rights, it was natural that the idea of implied reserves should be urged ... if a state negotiating an arbitration convention should fail to include therein the ‘saiving clause’ to protect its national honour and vital interests, the clause would still be considered by implication.”<sup>10</sup> Apart from the permissibility of reservations, an author argued that if a State is free to accept or not to accept the obligations set forth in the clause, then, in the absence of contrary provisions, the freedom not to accept the optional clause includes the freedom to make acceptance subject to conditions.<sup>11</sup>

The disputes about the permissibility of limitations on or reservations to declarations under the optional clause were rather academic in nature from the very outset, for in practice States availed themselves of the possibility to make reservations. In the declarations of acceptance there appeared multifarious reservations of varying scope and contents besides those mentioned in Article 36, of the Statute.

The permissibility of reservations was likewise addressed by the League of Nations, its Fifth Assembly entrusting the 1<sup>st</sup> Committee with studying ways and means to clarify and refine the provisions of Article. 36, of the Statute of the Permanent Court of International Justice in order to facilitate the widest possible acceptance of the clause.<sup>12</sup> The question was finally discussed in a subcommittee,<sup>13</sup> on the proposal of which and of the 1<sup>st</sup> Committee the Assembly of the League of Nations in its resolution of October 1924 expressed the view that the terms of the optional clause were broad enough for States to adhere to the clause “with the reservations which they regard as indispensable.”<sup>14</sup>

The 1<sup>st</sup> Committee of the League of Nations Assembly concurrently concerned itself with the elaboration of a draft protocol on the peaceful settlement of international disputes. According to Article. 3, of the draft prepared by the Committee, the signatory States recognize as compulsory the jurisdiction of

<sup>10</sup> Cf. Wilson, R. R.: Reservation clauses in agreements for obligatory arbitration. *American Journal of International Law*, 1929. 70–71.

<sup>11</sup> Cf. Williams, J. F.: The Optional Clause, The British Signature and Reservation. *The British Yearbook of International Law*, 1930. 637.

<sup>12</sup> For the resolution see League of Nations Official Journal Special Supplement No. 23. Records of the Fifth Assembly (Geneva 1924), 77.

<sup>13</sup> The members of the Subcommittee were Adatci, Apponyi, Loucheur, Erich, Fernandes, Sir Cecil Hurst, O’Byrne, Politis, Rolin, Scialoja, Titulesco, De la Torriente, Limburg, Unden. Cf. Maus: *op. cit.* note 35. 17.

<sup>14</sup> League of Nations Official Journal (Note 12), 225.

the Court in respect to the issues mentioned in Article 36, of the Statute, without, however, the Court's jurisdiction affecting the right of any State to make reservations consistent with the said clause.<sup>15</sup>

The limitations on reservations were also addressed by the aforementioned Committee. But who is to decide which reservations are consistent with the said clause? Scialoja pointed out on this score that the Court was always competent in the question of its own jurisdiction and that the problem of whether a reservation was consistent with the Statute was one of competence, which was therefore solved in that way.<sup>16</sup> An another view, expressed by Loucheur concerning the scope of reservations, a State may accede to the Statute including practically "all reservations" in its declaration.<sup>17</sup> That position calls for explanation today. More accurately, one should say that a State might as well include in its declaration all reservations that happened to be made at the time. Under present-day conditions, however, such a declaration can only be made in theory, considering the wide range of reservations.

In its report on reservations to declarations of acceptance the 1<sup>st</sup> Committee of the League of Nations Assembly stated that on the basis a thorough examination of the text it can be stated that its flexibility leaves room for any kind of reservations. Since State may recognize the Court's compulsory jurisdiction in some classes of disputes and may not in others, they are all the more free to recognize compulsory jurisdiction in only a fraction of one of those classes. For that matter, in its report the Committee enumerated the conceivable reservations, adding that the reservations attached to the obligations mentioned in Article 36, can be of quite a wide scope.<sup>18</sup>

During the preparations for the Disarmament Conference held in 1932 under the auspices of the League of Nations the question of reservations to declarations of acceptance was again on the agenda, since comparatively few States had made a declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice and a part of the declarations had not come into force. The Subcommittee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference discussed this question, and Assembly's resolution of 26 September 1928 on the General Act for the Pacific Settlement of International Disputes, dealing also with the optional

<sup>15</sup> *Ibid.* 498–499.

<sup>16</sup> *Ibid.* No. 24. Annexe 18.37. Quot. Maus: *op. cit.* 17.

<sup>17</sup> *Ibid.* 38. Quot. Maus: *op. cit.* 18.

<sup>18</sup> For the reservations see Société des Nations Journal Officiel, Procès verbal de la 1<sup>ère</sup> Commission, 109–110.

clause, was adopted as a result of deliberations in the Committee and the 3<sup>rd</sup> Committee of the League of Nations Assembly. In its resolution the Assembly stressed its wish to remove the obstacles to the accession of States to the optional clause and called their attention to the possibility of making reservations limiting their obligations in respect either of time or of scope. It was likewise mentioned in the resolution "...that reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and that these different kind of reservation can be legitimately combined."<sup>19</sup>

Some authors considered that resolution of the League of Nations as an interpretation of the Statute, while others definitely rejected that view.<sup>20</sup> Whichever way we look at the resolution, it was unquestionably a political declaration without any binding force. At any rate, declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice were made by several States after the adoption of the resolution. At the same time, however, the cited position of the League of Nations on reservations to declarations of acceptance had certain "negative" effects as well, for afterwards States came making more and more complicated declarations and multiplying the limitations on the jurisdiction recognized.

According to Hudson, the tendency for declarations to become more complicated was but encouraged by Article 39, of the General Act of Geneva, which enoumerated three classes of disputes which might be excluded from the operation of a treaty by reservation.<sup>21</sup>

The position of the League of Nations on reservations to declarations of acceptance is well reflected by the words of Politis at a meeting of the Committee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference. He stated: a State should choose to accede, rather than not to accede, to Article 36, of the Statute with reservations sharply

<sup>19</sup> For the resolution see *League of Nations Official Journal* Special Supplement No. 64. Record of the Ninth Ordinary Session of the Assembly Plenary Meetings, 183.

<sup>20</sup> Maus argues that the interpretation of the Statute of the Permanent Court of International Justice by the Assembly of the League of Nations has no legal force, because the Assembly was not empowered to modify and to interpret the Statute. The Statute was a separate treaty independent of the Covenant and subject to separate ratification, and the Member States of the League were not required to accede to the Statute. In point of fact, the Statute was either for the Court itself or for the Conference of States signatory to the Protocol of Signature of the Statute of the Permanent Court of International Justice to interpret. Cf. Maus: *op. cit.* 19.

<sup>21</sup> Hudson: *op. cit.* 468.

restricting its obligations. Acceptance with reservations, no matter of how little import, constitutes a new obligation among the States concerned and is to be regarded as a sign of confidence in the Court.<sup>22</sup>

The efforts of the League of Nations for the widest possible acceptance of the optional clause continued to be a concern of many authors even many decades later. At the end of the 1990s Judge Kooijmans observed "... that the League of Nations, in its efforts to encourage acceptance of the Court's jurisdiction, endorsed the making of reservations to such acceptance (although Article 36, paragraph 3, of the Statute does not formally authorize a declarant State to make such reservations), but by so doing weakened the system it tried to strengthen."<sup>23</sup>

## 2. The Post-World War Two Reservations

With regard to the question of reservations to declarations under the optional clause the San Francisco Conference identified itself fully with the practice of the Permanent Court of International Justice, although ideas pressing for change were also voiced.

During the deliberations in Subcommittee D of Committee IV/1 of the Conference Canada proposed that Article 36, paragraph 2, of the Statute should enumerate the conceivable reservations and include a clause allowing States to make further reservations, whereas Australia came forward with the proposal that there should be drawn up a list of permissible reservations similar to that of the 1928 General Act of Geneva. The Subcommittee rejected both proposals, however.<sup>24</sup>

In connection with reservations to declarations of acceptance the report of Subcommittee D to Committee IV/1 of the Conference noted the following:

<sup>22</sup> League of Nations Documents of the Preparatory Commission for the Disarmament Conference, Series IV, Minutes of the Second Session of the Committee on Arbitration and Security (Geneva: 1928), 57.

<sup>23</sup> See the separate opinion of Judge Kooijmans: *Fisheries Jurisdiction Case*. Jurisdiction of the Court. Judgement of 4 December 1998. Separate Opinion of Judge Kooijmans. *ICJ Reports* (1998), 489.

<sup>24</sup> Report of Subcommittee D to Committee IV/1 on Art. 36 of the Statute of the International Court of Justice. In: *UNCIO Documents*, vol. XIII, 558.

“The question of reservations calls for an explanation. As is well known, the article (Article 36, of the Statute) has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3, in order to make express reference to the right of the states to make such reservations.”<sup>25</sup>

After the International Court of Justice had been established, States continued the practice of attaching conditions, limitations on or reservations to declarations of acceptance and, moreover, increased the number thereof, “inventing” more and more complicated reservations. Quite a few of such reservations placed much more limitations on the Court’s compulsory jurisdiction than the interwar declarations of acceptance had done and a no small part of them left loopholes of escape from the jurisdiction recognized.

Incidentally, among the post-1945 declarations of acceptance there is hardly any by which, like the interwar declarations of acceptance by the Latin American States, a State accepted the Court’s jurisdiction without limitations or reservations.

In connection with the various reservations the question may rightly be asked as to what all this can be traced to and what is the reason for the growing number of increasingly complex reservations. In our view there are fundamentally three grounds for this phenomenon.

First, as it is very wittily pointed out in the report to the 1964 Tokyo Congress of the International Law Association, practically “(A)lmost every State has some skeletons in its closets and might not wish to have them exposed before the Court.”<sup>26</sup> The report goes on to say, that “Even if States could avoid some difficulties through reservations, they are usually afraid that they might have forgotten something important or that some new problems might arise which could not have been covered by specific reservations. It is this fear of unforeseen consequences which has led some States in the past to a refusal to accept the jurisdiction of the Court or to its acceptance with sweeping, open-ended reservations.”<sup>27</sup>

The second reason is related to the development of international law. As a consequence of the development of science and technology new subjects are

<sup>25</sup> *Ibid.* 559.

<sup>26</sup> *International Law Association Report of the Fifty-First Conference*, Tokyo, 1964. 87.

<sup>27</sup> *Ibid.*



emerging to be regulated by international law, issues which are also naturally likely to give rise to new and new international disputes, as is exemplified by the regime for the continental shelf. After it had become known that the continental shelves are rich in oil and gas resources, regulation by international law of these areas became inevitable, and a large part of the disputes submitted to the International Court of Justice are connected with the jurisdiction on and the delimitation of continental shelves.

The third reason can be ascribed to the fact that States have learnt from the jurisprudence of the Court, in the sense that, relying on the tenets formulated in the decisions of the Court, they have “shaping” new reservations in order to prevent the occurrence of similar cases. This is best demonstrated by the reservations which sought to avoid “surprise applications” and have become very common after the Court’s decision on the preliminary objections in the *Case concerning Right of Passage over Indian Territory*.

For that matter, the problem of reservations to optional clause declarations has been repeatedly addressed by the United Nations as well. Perhaps the most important is resolution 3232 (XXIX) on the “International Court of Justice”, which was adopted by consensus on the motion of the Sixth Committee of the General Assembly. In it the General Assembly recognized the desirability for States to study the ways and means of accepting the compulsory jurisdiction of the International Court of Justice with the least possible reservations in accordance with Article 36, of the Statute.<sup>28</sup> That appeal and similar ones were scarcely heeded, with so many and so diverse reservations placed on some declarations that, with some exaggeration, they came to give cause for asking which are really the disputes in which the Court has jurisdiction in respect to a particular State under Article 36, paragraph. 2, of the Statute. In the *Case of Certain Norwegian Loans* Sir Hersch Lauterpacht in his separate opinion was referring that situation by saying:

„In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the Acceptance which is subject to the jurisdiction of the Court”.<sup>29</sup>

<sup>28</sup> On this point see also the debate in the Sixth Committee. General Assembly 29th Session Sixth Committee, meetings 1465–1468; 1483–1486; 1490; 1492. Plenary meeting 2280.

<sup>29</sup> *Case of Certain Norwegian Loans*. Judgement of 6 July, 1957. Separate Opinion of Judge Sir Lauterpacht, H. *ICJ Reports*, 1957. 46.

The freedom to make reservations is recognized by most authors in the literature of international law, but occasionally one can meet with views that according to the new Statute no conditions, reservations to or limitations, etc. on declarations of accepting the compulsory jurisdiction other than those relating to “on condition of reciprocity” and “for a certain time”, namely the ones mentioned in the Statute itself, are permissible.<sup>30</sup> One author holds that there is one more permissible reservation in addition to the limitations mentioned in the Statute, notably States may, in line with Article 95 of the Charter, exclude from the operation of their optional clause declarations those disputes whose settlement they have previously entrusted to another tribunal.<sup>31</sup> These positions are based on the fact that the wording of the optional clause in the new Statute have been slightly amended by omitting from Article 36, paragraph 2, the words “*or any of the classes*” in the passage of “in all or any of the classes of legal disputes.” It seems, however, that in point of fact the said authors misunderstand Article 36 paragraph 2, of the Statute, since the amendment of this Article is meant to say that States are no more free in their declarations of acceptance to pick and choose amongst the four enumerated classes of legal disputes listed in Article 36, paragraph 2, of the Statute. However, the said amendment did not alter the freedom to make reservations to the declarations of acceptance in the same way as it existed at the time of the Permanent Court of International Justice.<sup>32</sup>

The view about the non permissibility of reservations not mentioned in the Statute was revived a few years ago in the *Case concerning the Aerial Incident of 10 August 1999* (Pakistan v. India). Because of the dispute relating to the destruction of Pakistani aircraft, Pakistan filed an application against India on the basis of Article 36, paragraphs 1 and 2, of the Statute and of the declarations of acceptance by the two States. India responded by submitting preliminary objections, in which it invoked, *inter alia*, the Commonwealth reservation of its declaration of acceptance. Pakistan argued that no reservations other than those mentioned in the Statute may be attached to declarations under the optional clause. Limitations not included in the Statute—deemed to be “extra-statutory reservations”—exceed the conditions allowed for under Article 36, paragraph 3,

<sup>30</sup> Vulcan, C.: La clause facultative. XVIII *Acta Scandinavica Juris Gentium*, 1947–1948. 1, 42.

<sup>31</sup> Thévenaz, H.: La nouvelle Cour internationale de Justice. *Die Friedens-Warte*, 1945, 411.

<sup>32</sup> Cf. Waldock, C. H. M.: Decline of the Optional Clause. *The British Yearbook of International Law*, 1955–56. 249.

of the Statute. According to Pakistan the Commonwealth reservation is inapplicable and not opposable to Pakistan.<sup>33</sup>

With regard to extra-statutory reservations the Court stated that paragraph 3 of Article 36, had never been considered as an exhaustive enumeration of conditions under which States' optional clause declarations might be made. For this reason the Court dismissed the Pakistani argument that Commonwealth reservations were to be seen as "extra-statutory reservation" because it contravened Article 36, paragraph 3, of the Statute.<sup>34</sup>

On the basis of the foregoing it can be stated that the views limiting the reservations to declarations may be regarded as isolated, the dominant position being that according to the generally accepted interpretation of the Statute it is an inalienable right of States to attach different reservations, limitations on or conditions to their declarations under the optional clause. As regards the relationship between the various reservations and the provisions of the Statute, Crawford comes to the conclusions that since Article 36, paragraph 3, suggest that no other conditions were intended, "(T)he process by which reservations came to be accepted is a striking case of interpretative development of Article 36 by subsequent practice...".<sup>35</sup>

The permissibility of reservations attached to the declarations of acceptance and the liberty to shape their contents are similarly confirmed by the rarity of objections by States against other States' declaration of acceptance or limitations contained therein. Such was the case, for instance, in the mid 1950s, when Sweden objected against the reservation of the Portuguese declaration of 19 December 1955 to the effect that Portugal may at any time remove any class of dispute from the operation of its declaration of acceptance.<sup>36</sup> That objection was of little effect, as is best evidenced by the fact that in the *Right of Passage case* the Court did not even pronounce on the Swedish objection to the reservation of

<sup>33</sup> *Case concerning the Aerial Incident of 10th August 1999*. Pleadings, Memorial of the Government of Pakistan on Jurisdiction, paras. D–E.

<sup>34</sup> *Case concerning the Aerial Incident of 10th August 1999*. Jurisdiction of the Court. Judgement of 21 June 2000. *ICJ Reports*, 2000. paras. 37, 38.

<sup>35</sup> Crawford, J.: *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*. *The British Yearbook of International Law*, 1979. 79.

<sup>36</sup> For the Swedish declaration see ICJ Pleadings *Right of Passage over Indian Territory*, Vol. I. 217. Sweden declared that, in view of the conditions included in the Portuguese declaration, Portugal had not in fact accepted the Court's jurisdiction in respect to any dispute or to any class of disputes. That condition nullifies the obligation which the terms of Article 36, paragraph 2, of the Statute seek to impose, expressing that the jurisdiction of the Court is 'ipso facto' compulsory.

the Portuguese declaration of acceptance, albeit it had examined the validity of the Portuguese declaration.

An objection by another declarant State to the reservation included in an other State's declaration of acceptance is to be found only in concrete disputes before the Court in which attempts are made to challenge in the form of preliminary objection the reservations invoked by the opponent party.

### 3. The Special Feature of Reservations to Declarations of Acceptance

The freedom to accept the Court's compulsory jurisdiction with limitations or reservations has been recognized not only by the literature of international, but also by the two International Courts. In disputes which involved reservations to declarations of acceptance the majority of judges accepted the particular condition or reservation and did not consider the question of permissibility; they had never denied the permissibility of reservations to declarations of acceptance, only analysing the compatibility of a given reservation with the Statute and the optional clause system.

As regards the permissibility of reservations, the position of the International Court of Justice is reflected most clearly in its statement made in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*:

“Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations.”<sup>37</sup>

The conditions or reservations to be found in declarations under the optional clause differ from reservations made to multilateral treaties chiefly in that in the case of declarations of acceptance there is no text of a treaty agreed upon by the contracting parties, one which the State making the reservation wishes to depart from, to which it would be necessary to obtain the consent of the other parties to the treaty. So what we have here is not exclusion or modification the operation of certain provisions of the treaty, originally formulated jointly

<sup>37</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua*. Jurisdiction of the Court and Admissibility of the Application Judgement of 26 November 1984. *ICJ Reports*, 1984. 418.

with the other contracting parties.<sup>38</sup> As is shown by the practice of over eight decades, in making declarations under the optional clause States act in full freedom, deciding alone the scope of their declarations as well as the conditions on which they accept the Court's compulsory jurisdiction. In connection with declarations of acceptance there has arisen no rule to require any uniform text or similar content in any aspect. This was reaffirmed by the Court in the *Fisheries Jurisdiction Case* to the effect that "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of compulsory jurisdiction of the Court."<sup>39</sup>

Another characteristic of limitations on, conditions or reservations to declarations of acceptance is that a limitation, condition or reservation—owing to the principle of reciprocity, which can be deemed to be a basic element of the optional clause system—operates to modify the commitments not only of the declarant State, but also of the other States party to the optional clause system, in any case where the Court's jurisdiction was based on optional clause declarations. In a given case the limitations, conditions or reservations included in the declaration of a party, following from the principle of reciprocity, the opponent party may equally be rely upon these limitations, conditions or reservations. All this carries in itself the element of uncertainty that a State party to the optional clause system cannot know in advance whether in a future dispute a limitation, condition or reservation included in the declaration of other State parties to the optional clause system may be of advantage or of disadvantage to it.

Thus the limitations, conditions or reservations offer a possibility to exclude some unforeseen—or perhaps very likely—disputes, a possibility what could be an eventual advantage or disadvantage both to the State formulating the limitation, condition or reservation and to the State or States having opposite

<sup>38</sup> In this context we have in mind acquiescence in reservations and eventual objections to reservations. At first sight (mainly if one is not fully aware of the characteristics of the optional clause) one might even raise the question whether Article 36, paras. 2 and 3, of the Statute, i.e. the optional clause, cannot be seen as a kind of „basic text” which States may exclude, modify, etc. by reservations to declarations of acceptance. Such an approach is mistaken by all means. Art. 36, paras. 2 and 3, of the Statute as the treaty provision which was adopted by the contracting parties and from which a State may depart by a reservation could be taken into consideration if the Statute prescribed the compulsory jurisdiction of the Court which States were allowed to „contracting out”.

<sup>39</sup> *Fisheries Jurisdiction Case*. Jurisdiction of the Court. Judgment 4 December 1998. *ICJ Report*, 1998. 453.

interests in a later case, depending on the subject matter of concrete disputes. It appears that we may not be far from the truth in supposing that what might also be lurking behind the rather seldom objections by States party to the optional clause system to limitations, conditions or reservations is perhaps the belief also of other States party to the system that in the future it could be an advantage to themselves to exclude certain disputes from the scope of compulsory jurisdiction. It is of course rather difficult to provide an instance of all this, but it is easy to suppose that reservations excluding disputes concerning certain armed conflicts can be consigned to this category and that exclusion in advance of such disputes from the Court's jurisdiction will meet with a kind of tacit agreement of all States affected by the given armed conflict.

In illustration of the later "advantage" or "disadvantage" of a reservation by a party to the optional clause system to the other States party to the system we could cite various examples, but in reality the question of when a reservation in the declaration of a State will become of disadvantage or of advantage to another State party the optional clause system is subject to change from case to case. The latter is the case whenever the respondent State in its preliminary objection invokes the reservation in the declaration of acceptance by the applicant State and the objection is upheld by the Court. The best known among such cases is the *Case of Certain Norwegian Loans*, in which Norway as the respondent referred to, on the basis of reciprocity, the very controversial Connally reservation included in the French declaration of acceptance. The Court uphold the Norwegian objection and held that it had no jurisdiction.<sup>40</sup>

<sup>40</sup> See the Court's judgement on the preliminary objections: *Case of Certain Norwegian Loans* Judgement of 6 July 1957. *ICJ Reports* 1957. 9–28.